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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14

15 COUPONS, INC.,
16 Plaintiff,
v.
17 JOHN STOTTELMIRE and DOES 1-10,
18 Defendants.

Case No. 5:07-CV-03457 HRL

BRIEF AMICUS CURIAE OF
ELECTRONIC FRONTIER
FOUNDATION IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS

19 Date: April 22, 2008
20 Time: 10:00 A.M.
Place: Courtroom 2, 5th Floor
Judge: Hon. Howard R. Lloyd

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1 I. INTEREST OF AMICUS

2 The Electronic Frontier Foundation (“EFF”) is a nonprofit public interest
3 organization dedicated to protecting civil liberties and free expression in the digital world.
4 Founded in 1990, EFF represents the interests of Internet users in court cases and in the broader
5 policy debates surrounding the application of law in the digital age and publishes a
6 comprehensive archive of digital civil liberties information on its website at EFF.org.

7 In working to ensure that the public’s traditional rights are preserved as we move
8 into the digital era, EFF has participated as counsel or *amicus curiae* in many of the leading
9 cases testing the anticircumvention provisions of the Digital Millennium Copyright Act
10 (“DMCA”).

11 The Samuelson Law, Technology & Public Policy Clinic at the U.C. Berkeley
12 School of Law (Boalt Hall) (“Clinic”) was the first clinic in the country to provide law students
13 with the opportunity to represent the public interest in cases and matters on the cutting-edge of
14 high technology law. Since January 2001, students participating in the Clinic have worked with
15 leading lawyers in nonprofit organizations, government, private practice, and academia to
16 represent clients on a broad range of legal matters including free speech, privacy, copyright, and
17 open source software.

18 II. INTRODUCTION AND SUMMARY OF ARGUMENT

19 The causes of actions claimed in Coupons, Inc.’s (“Coupons”) Second Amended
20 Complaint (“SAC” or “Complaint”) raise troubling questions of public policy. If allowed, they
21 threaten the public interest in three ways: (1) they blur the Congressionally-delineated line
22 between DMCA access controls and rights controls, (2) they improperly extend the DMCA to
23 prohibit protected speech, and (3) they create a new theory of trespass to chattels and conversion
24 that threatens to inject inconsistent state laws into an area explicitly reserved to the federal
25 Copyright Act. EFF and the Clinic strongly urge this Court to reject these arguments and dismiss
26 Claims One and Five from the SAC.

27 Coupons first threatens the public interest by blurring Congress’s carefully crafted
28 distinction between technological measures that guard against *access* to a work (“access

1 controls”—which are protected under § 1201(a) of the DMCA—and technological measures
2 that secure *exclusive rights* protected by the Copyright Act (“rights controls”—which are
3 protected under § 1201(b)(1) of the DMCA.¹ *See generally* Nimmer & Nimmer, 3 Nimmer on
4 Copyright § 12A.03[C] & [D] (hereinafter “Nimmer”). The distinction between access controls
5 and rights controls is not merely semantic; Congress specified very different restrictions on
6 circumvention for these two types of technological protection measures. Specifically, the
7 DMCA’s section on rights controls applies only to the distribution of circumvention tools, and,
8 unlike the section on access controls, does not apply to individual acts of circumvention. This
9 distinction leaves room for individual fair uses, adaptations for the blind, library research, and
10 the other statutory exceptions to copyright.

11 Coupons alleges that Defendant John Stottlemire (“Stottlemire”) created and
12 distributed a tool that modified Coupons’ software and allowed users to print more coupons than
13 would otherwise be possible. (SAC ¶¶ 26-27.) Coupons then alleges that, based on these actions,
14 Stottlemire violated both the access-control and rights-control provisions of § 1201. (SAC ¶¶ 39-
15 44.) Yet, as Coupons’ own Complaint makes clear, the security measure Stottlemire is alleged to
16 have circumvented only controlled *reproduction* of the coupons, not *access* to them, and thus can
17 only fall under § 1201(b)(1). Accordingly, Coupons’ First Cause of Action should be dismissed.

18 Additionally, it appears that Coupons rests its DMCA claims at least partially on
19 writings Mr. Stottlemire posted on the Internet. (*See* SAC ¶¶ 24-25, 37.) As these writings appear
20 to be pure speech, such allegations directly implicate the First Amendment as well as ignore the
21 definition of a circumvention tool in both § 1201(a)(2) and § 1201(b). They also disregard the
22 explicit free speech exemption of § 1201(c)(4). Accordingly, any cause of action that predicates
23 liability on such speech should be dismissed.

24 Finally, Coupons’ Fifth Cause of Action alleges that Stottlemire committed
25 trespass to chattels and conversion. These claims must also fail for three reasons. First, Coupons
26

27 ¹ Unless otherwise noted, all statutory citations are to Title 17 of the U.S. Code.
28

1 has failed to identify the property allegedly converted or trespassed upon and therefore misses
2 the most essential element of the claim. Second, if Coupons is claiming its trespass and
3 conversion claims are based on its interest in some tangible property, the claims fail because the
4 only tangible property identified in the Complaint belongs to Stottlemire. Third, and perhaps
5 most importantly, if Coupons is basing its claims on intangible property rights in its allegedly
6 copyrighted coupons or software, those claims are preempted by Section 301 of the Copyright
7 Act. Therefore, the Fifth Cause of Action should be dismissed.

8 **III. ARGUMENT**

9 **A. The First Cause of Action Should Be Dismissed Because Coupons Has Not**
10 **Alleged Facts Supporting a Claim for Circumvention of an Access Control**
 under Section 1201(a)

11 Section 1201 contains two separate types of technology prohibitions: (1)
12 prohibitions on technologies that circumvent measures that control access to a copyrighted work,
13 set forth in § 1201(a) (access controls), and (2) prohibitions on technologies that circumvent
14 measures that protect a statutory right of the copyright holder, set forth in § 1201(b) (rights
15 controls). *See S. Rep. No. 105-190, 1998 WL 239623 at *12 (1998)*² (stating that the sections
16 “are designed to protect two distinct rights and to target two distinct classes of devices.
17 Subsection 1201(a)(2) is designed to protect access to a copyrighted work. Section 1201(b) is
18 designed to protect the traditional copyright rights of the copyright owner.”); 3 Nimmer
19 § 12A.03[C].

20 In the Complaint, Coupons alleges that Mr. Stottlemire violated both § 1201(a)
21 and § 1201(b) of the DMCA by creating and distributing software that removed limitations on
22 the number of times a coupon could be printed from the coupons.com website. (SAC ¶¶ 26-27;
23 39-44 (First Cause of Action under 1201(a)); 45-48 (Second Cause of Action under 1201(b))).
24 As the Complaint itself makes clear, however, the “security features” allegedly bypassed only
25 controlled the number of copies of each coupon a user could print. Because reproduction is not

27 ² The complete legislative history of the DMCA can be found at
 <<http://www.hrrc.org/index.php?id=20&subid=3>>.

1 an issue of *access*, but rather an exclusive right of a copyright owner, the only proper cause of
2 action available to Coupons would be under § 1201(b)(1) for manufacture or distribution of a
3 device that circumvents a rights control. Accordingly, the First Cause of Action under § 1201(a)
4 should be dismissed.

5 **1. The DMCA Requires that a Technological Measure that Controls**
6 **Reproduction Be Analyzed Under Section 1201(b), Not 1201(a)**

7 Section 1201 created a new form of protection for copyrighted works. Prior to the
8 enactment of the DMCA, a user of copyrighted material was not prohibited from circumventing
9 any technological protection measure that was included with that work. *See Vault Corp. v. Quaid*
10 *Software, Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) (holding, prior to the enactment of the DMCA,
11 that the maker of a software program that defeated copy-protection measures on floppy disks was
12 not liable for contributory copyright infringement); *see also* S. Rep. No. 105-190, 1998 WL
13 239623 at *12 (1998) (“The prohibition in 1201(a)(1) is necessary because prior to this Act, the
14 conduct of circumvention was never before made unlawful.”). In enacting § 1201, Congress
15 sought to give copyright owners greater legal recourse in protecting their intellectual property
16 while preserving the public’s long recognized right to engage in certain non-infringing uses of
17 that property such as fair use. *See R. Anthony Reese, Will Merging Access Controls and Rights*
18 *Controls Undermine the Structure of Anticircumvention Law?*, 18 Berkeley Tech L.J. 619, 623-
19 24 (2003).

20 In order to achieve this dual goal, § 1201 of the DMCA divides security features
21 into two distinct groups and governs them through two separate subsections: § 1201(a) and
22 § 1201(b). *See* 3 Nimmer § 12A.03 [C] (“Although the two provisions ‘are worded similarly and
23 employ similar tests, they are designed to protect two distinct rights and to target two distinct
24 classes of devices.’”) (citation omitted).

25 Subsection (a) applies to any “technological measure that effectively controls
26 *access*” to a copyrighted work. § 1201(a)(1)(A) (emphasis added). Such a measure effectively
27 controls access to the work “if the measure in the ordinary process of its operation, requires the
28 application of information or a process or a treatment, with the authority of the copyright owner,

1 to gain access to the work.” § 1201(a)(3)(B). For access-control measures, the statute bars both
2 the individual act of circumvention, § 1201(a)(1)(A), and the distribution, manufacture and
3 dissemination of circumvention tools, § 1201(a)(2)(A)-(C).

4 Subsection (b), on the other hand, applies only to a “technological measure that
5 effectively protects a *right* of a copyright owner under this title.” § 1201(b)(1)(A) (emphasis
6 added). *See* 3 Nimmer § 12A.03 [C] (“[t]he difference [between sections (a) and (b)] can be
7 compared to breaking into another’s domain, as opposed to being permitted entry—but then
8 proceeding to violate the host’s ‘house rules.’”). The rights, or “house rules,” referenced by
9 § 1201(b) are the exclusive rights granted by § 106 of the Copyright Act, including the right to
10 reproduce the work in § 106(1). Unlike subsection (a), subsection (b) prohibits only the
11 manufacture and distribution of a circumvention tool; it “does not, by itself, prohibit the
12 circumvention of effective technological copyright protection measures.” S. Rep. No. 105-190, at
13 *29 (1998); *see also* Reese, 18 Berkeley Tech L.J. at 653 (“The main difference in the regulation
14 of access and rights controls . . . is that the statute bans only acts that circumvent access-control
15 measures. Circumvention devices, on the other hand, are equally prohibited, regardless of which
16 type of control measure they circumvent.”).

17 The chart below summarizes the differences between § 1201(a) and § 1201(b).

	<i>Act of Circumvention</i>	<i>Distribution/Manufacture of Circumvention Tool</i>
19	<i>Access-Control Technology</i>	Prohibited by § 1201(a)(1)
21	<i>Rights-Control Technology</i>	Not prohibited
23		Prohibited by § 1201(b)(1)

24 The distinction between these two prohibitions represents an important statutory
25 and policy choice made by Congress when it passed the DMCA in 1998. In forbidding the act of
26 circumvention for access-controls but not for rights-controls, Congress “anticipated that most
27 acts of circumventing a technological copyright protection measure [(rights control)] will occur
28 in the course of conduct which itself implicates the copyright owners[‘] rights under title 17.” S.

1 Rep. No. 105-190, at *29 (1998). In other words, no ban on acts of circumvention was needed
2 for rights controls because traditional copyright law principles already provided sufficient
3 protections for copyright owners.

4 Further, Congress did “not intend[] in any way to enlarge or diminish those
5 rights.” *Id.* Traditional copyright law provides both rights for copyright holders, *see* § 106, and
6 exceptions to those rights that benefit the public, *see* §§ 107-22. These exceptions include the
7 fair use exception defined in § 107,³ the exception for distributing copies in a format readable by
8 the blind in § 121, and the exception for creating a backup copy of computer software in § 117.

9 A ban on the *act* of circumventing rights controls would have potentially limited the
10 effectiveness of these exceptions.⁴ In order to avoid this result, § 1201(b) does not prohibit acts
11 of circumvention that enable copying. *See United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111,
12 1120-21 (N.D. Cal. 2002) (“Congress did not prohibit the act of circumvention [under § 1201(b)]
13 because it sought to preserve the fair use rights of persons who had lawfully acquired a work.”).
14 Practically, this means that if a user gains lawful access to a copyrighted work, copying that

15 _____
16 ³ The Supreme Court has emphasized that fair use serves to harmonize the restrictions of
17 copyright law with the First Amendment. *See Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003)
18 (explaining that fair use is one of copyright law’s “built-in First Amendment accommodations”).
19 Without the fair use doctrine, many socially-valuable forms of speech would be prohibited by
20 copyright law. *See, e.g. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding a
21 musical parody of the song “Pretty Woman” was protected under the fair use doctrine);
22 *MasterCard Int’l Inc. v. Nader 2000 Primary Comm., Inc.*, 70 U.S.P.Q.2d 1046 (S.D.N.Y. 2004)
23 (finding a political ad that parodied Mastercard’s ad campaign was fair use); *Hustler Magazine,*
24 *Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1536 (C.D. Cal. 1985), *aff’d*, 796 F.2d 1148 (9th
25 Cir. 1986) (holding that Jerry Falwell’s use of Hustler’s copyrighted cartoon attacking him to
26 raise donations from his followers qualified as fair use in part because it was a portion of a
27 broader dialogue and thus served the public interest in free expression).

28 ⁴ For example, in cases involving the ban on circumvention of access controls, courts are still
29 debating whether traditional copyright exceptions provide a defense. *See Storage Tech. Corp. v.*
30 *Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1318-19 (Fed. Cir. 2005) (holding
31 that a copyright holder must show a nexus to infringement in order to succeed in a claim under
32 the DMCA and that statutorily exempted actions did not create such a nexus); *but see 321*
33 *Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.Supp.2d 1085, 1101-02 (N.D. Cal. 2004)
34 (holding that the bar on circumvention of access controls in the context of DVDs did not
35 impermissibly burden fair use because the public could find ways to fairly use the material
36 without circumventing the access control).

1 qualifies as fair use under § 107 does not give rise to liability even if a technological control that
2 restricts copying was circumvented in the process. *See Reese*, 18 Berkeley Tech. L.J. at 623
3 (“[A] person who circumvents a rights-control measure does not commit any violation of § 1201,
4 and . . . is subject only to liability for copyright infringement[.]”). Therefore, for individual acts
5 of circumvention involving rights controls, the traditional balance between the public and
6 copyright holders is maintained.

7 The anti-distribution provision of § 1201(b) does not defeat Congress’s intention
8 to leave the traditional copyright exceptions intact. This ban applies only to tools that (1) are
9 primarily designed for circumventing a rights control, or (2) have only limited commercial
10 purpose other than circumventing a rights control, or (3) are marketed for the purpose of
11 circumventing a rights control. § 1201(b)(1)(A)-(C). Therefore, it is possible not only to
12 circumvent a rights control without falling afoul of § 1201(b), but also to distribute a tool that
13 facilitates such circumvention as long as that tool does not fall into one of the above categories.
14 *Id.* This reinforces the fact that Congress did not intend § 1201 to effectively eliminate the
15 traditional copyright exceptions for works protected with a rights-control technology. *See also* S.
16 Rep. No. 105-190, at *12, *29 (1998) (stating that 1201(b) was intended to “enforce[] the
17 longstanding prohibitions on infringements” and that the “provision is designed to protect
18 copyright owners, and simultaneously allow the development of technology.”).

19 Therefore, in order to help preserve the public’s traditional rights under copyright
20 law as Congress intended, it is important that the distinction between §§ 1201(a) and (b) not be
21 blurred.

22 **2. Plaintiff’s Complaint Describes a Rights Control Not an Access
23 Control**

24 Coupons’ First Cause of Action attempts to blur the line between access controls
25 and rights controls by alleging a violation of § 1201(a) even though Coupons’ security measures,
26 as alleged in the Complaint, are solely intended to prevent users from printing additional
27 unauthorized copies of their coupons. Copying, or reproduction, is clearly specified as one of the
28 exclusive rights reserved to a copyright holder. § 106(1). Therefore, as noted above,

1 circumvention of a measure that controls reproduction but not access should be analyzed under
2 § 1201(b).

3 Coupons' security features cannot qualify as an access control because the
4 coupons at issue are fully accessible to any user the first time they are printed. While the DMCA
5 does not explicitly define what constitutes an access control, courts interpreting the statute have
6 made clear that a security measure cannot qualify as an effective access control when the work it
7 purports to protect is otherwise accessible. For example, in *Lexmark Int'l, Inc. v. Static Control*
8 *Components, Inc.*, 387 F.3d 522 (6th Cir. 2004), the court found that a security feature that had
9 to be bypassed in order to activate software embedded within a printer was not an effective
10 access control because a user who had bought the printer already had access to the software
11 inside the printer by simply opening it up physically. *Id.* at 547 ("[J]ust as one would not say that
12 a lock on any door of a house 'controls access' to the house after its purchaser receives the key to
13 the lock, it does not make sense to say that this provision of the DMCA applies to otherwise-
14 readily-accessible copyrighted works."). Similarly, in *Elcom*, where the defendant distributed a
15 tool that removed the technological protection measures embedded in electronic books that
16 controlled whether a book could be copied or distributed, the court analyzed the case under
17 § 1201(b) as a rights-control case. 203 F. Supp. 2d at 1122. Users with or without a
18 circumvention tool were able to view the book, so the tool was only needed to make
19 unauthorized copies, not to access the material in the first place. *Id.* at 1118.

20 To qualify as an access control, a technological protection measure must control
21 *complete* access to a work, making circumvention necessary to gain any access to the work at all.
22 For example, DVD encryption was found to be an effective access control because it prevented
23 any viewing of the underlying movie. *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294,
24 317-18 (S.D.N.Y. 2000), *aff'd sub nom., Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir.
25 2001). This view is supported by the legislative history of the DMCA in which Congress posited
26 that "measures that can be deemed to 'effectively control access to a work' would be those based
27 on encryption, scrambling, authentication, or some other measure which requires the use of a
28 'key' provided by a copyright owner to gain access to a work." H.R. Rep. No. 105-551(II), 1998

1 WL 414916 at *39. The Senate Report additionally specifies that the ban on circumvention of an
2 access control “does not apply to the subsequent actions of a person once he or she has obtained
3 authorized access to a copy of a work protected under title 17, even if such actions involve
4 circumvention of other types of technological protection measures.” S. Rep. No. 105-190, 1998
5 WL 239623 at *28.

6 As described in the Complaint, Coupons’ security measures do not meet the
7 definition of an access control. Rather, since Coupons’ admitted purpose is to limit a user’s
8 ability to reproduce the allegedly copyrighted coupons, (SAC ¶ 16), this case presents a clear
9 example of a rights-control technology and should be analyzed under § 1201(b). For example,
10 the Complaint specifies that “Plaintiff offers a number of security products to its clients to
11 prevent unauthorized *copying* of its coupons, including proprietary technology that limits the
12 number of times a user can print a coupon.” (SAC ¶ 13 (emphasis added).) Additionally it states
13 that the software “contains built-in security measures to prevent consumers from printing more
14 than the authorized number of *copies* of the coupons.” (*Id.* ¶ 16 (emphasis added).) Finally, the
15 Complaint maintains that “Plaintiff’s *anti-copying restrictions* are critical to the integrity and
16 desirability of Plaintiff’s technology. Plaintiff’s ability to control *electronic reproduction* of
17 unique coupons is crucial to Plaintiff’s commercial success.” (*Id.* ¶ 17 (emphasis added).)

18 To understand why this technology, as described, cannot qualify as an access
19 control, imagine two different users of the software: the first has installed Coupons’ software but
20 has not modified it, the second has installed Coupons’ software and then modified it with
21 Stottlemire’s alleged circumvention tool. Both users can access a coupon. Additionally, both can
22 print it at least once (probably twice). (*See* SAC ¶ 30.) The difference between them appears only
23 when the users try to print more than two copies of the coupon; the first user with the unmodified
24 software cannot, while the second user with the modified software can. Therefore, the
25 circumvention tool only changes the number of times that a user can reproduce a coupon. (*See*
26 SAC ¶ 26 (“Defendants created and used software that purported to remove Plaintiff’s security
27 features, for the purpose of printing more coupons than Plaintiff’s security features allow”.) It
28 does not control initial access; the user without the circumvention tool can access the coupon as

1 easily as the user with it. In this way, Coupons' security measure mirrors those analyzed in
2 *Lexmark* and *Elcom*; it cannot be an effective access control because any user of the system is
3 provided unrestricted access to at least one copy of the copyrighted work. *See Lexmark*, 387 F.3d
4 at 547; *Elcom*, 203 F. Supp. 2d at 1118; S. Rep. No. 105-190, at *28.

5 The Court should follow the examples of *Lexmark* and *Elcom* by analyzing the
6 circumvention tool only under § 1201(b) and dismissing Coupons' First Cause of Action under
7 § 1201(a).

8 **B. The First and Second Causes of Action Should Be Narrowed Because Mr.
9 Stottlemire's First Amendment-protected Speech is not a Circumvention
Tool**

10 In addition to blurring the line between access and rights controls, Coupons'
11 Complaint attempts to expand the scope of anticircumvention liability to encompass comments
12 Mr. Stottlemire posted on several online forums. (SAC ¶ 24, 37.) Coupons alleges that in these
13 comments Mr. Stottlemire described a method for removing its security features. (SAC ¶ 24.) It
14 is important to distinguish between these written comments and the software tool Mr. Stottlemire
15 is also alleged to have posted online (*see* SAC ¶¶ 26-27) and to narrow the First and Second
16 Causes of Action to exclude any claims based on Mr. Stottlemire's protected speech.

17 **1. Neither § 1201(a) nor § 1201(b) Applies to Mr. Stottlemire's Pure
18 Speech**

19 Sections 1201(a)(2) and 1201(b)(1) both specify that "[n]o person shall
20 manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product,
21 service, device, component, or part thereof." §§ 1201(a)(2), 1201(b)(1). Under any ordinary
22 reading of the words listed, Mr. Stottlemire's written instructions do not qualify as a
23 circumvention tool. Moreover, as will be discussed in the next section, even if one of the
24 categories could be stretched to include Stottlemire's writings, Congress has explicitly precluded
25 such an interpretation in § 1201(c)(4).

26 Coupons alleges that Stottlemire's online comments are one of the bases for its
27 First and Second Causes of Action; Coupons refers to Stottlemire's informative comments as
28 "circumvention methods," (SAC ¶ 24, 37), and then alleges that providing a "method" is a

1 violation of the DMCA. (SAC ¶ 41, 46.) “Method” is a word notably absent from the definition
2 of a circumvention tool in sections 1201(a) and (b). Moreover, cases interpreting the DMCA
3 show that plain text speech such as Stottlemire’s was never intended to be covered by the phrase
4 “technology, product, service, device, component, or part thereof” in the statute. For example,
5 courts have found that trafficking in computer software that decrypted DVDs qualified under the
6 “technology” prong of 1201(a)(2), *Reimerdes*, 111 F. Supp. 2d at 317 (S.D.N.Y. 2000), and that
7 distributing computer hardware that modified a video game system so as to avoid technological
8 protection measures qualified under the “device” prong, *Sony Computer Entertainment America,*
9 *Inc. v. Divineo, Inc.*, 457 F. Supp. 2d 957, 965 (N.D. Cal. 2006). However, no court has extended
10 any of these terms to encompass written instructions. In alleging that Stottlemire’s written
11 descriptions of circumvention “methods” fall within the DMCA, Coupons is asking the Court to
12 ignore the statutory definition of a circumvention tool.

13 Therefore, because the plain meaning of the statute excludes Stottlemire’s online
14 comments, the First and Second Causes of Action should be narrowed to eliminate any reliance
15 on those comments.

16 **2. Section 1201(c)(4) Expressly Precludes Application of the DMCA to
17 Stottlemire’s Pure Speech**

18 Even if the meaning of “technology, product, service, device, component, or part
19 thereof” within sections 1201(a) and (b) could be stretched to encompass Mr. Stottlemire’s
20 speech, his comments are nonetheless expressly protected by § 1201(c)(4). This section states,
21 “Nothing in this section shall enlarge or diminish any rights of free speech . . . for activities using
22 consumer electronics, telecommunications, or computing products.” § 1201(c)(4).

23 Mr. Stottlemire’s online comments describing his alleged circumvention method
24 constitute protected speech. *See Universal City Studios v. Corley*, 273 F.3d at 447 (“Thus, for
25 example, courts have subjected to First Amendment scrutiny restrictions on the dissemination of
26 technical scientific information, and scientific research, and attempts to regulate the publication
27 of instructions.”) (citations omitted). The closest any court has come to applying the DMCA to a
28 form of speech was in *Universal City Studios v. Corley*. There, however, the court held that the

1 DMCA’s anticircumvention provisions applied to executable computer code—a form of speech
2 that could be regulated because it also functionally performed the act of circumvention. *Id.* at
3 451. Further, the court held that Internet hyperlinks connecting users of defendant’s web page
4 directly to the unlawful computer program could be prohibited, again because the program at
5 issue directly performed the circumvention act. *Id.* at 457. The court reasoned that computer
6 code (and direct hyperlinks to it) were entitled to less protection than pure speech because
7 computer code had both functional and expressive elements and could yield a “functional result
8 without any human comprehension of its content, human decision-making, [or] human action.”
9 *Id.* at 451. This instantaneous functionality distinguished code from other types of instructions
10 such as “a blueprint or a recipe” which the court classified as “entirely speech.” *Id.*

11 Mr. Stottlemire’s comments, however, are precisely like a recipe or a blueprint.
12 His descriptions of circumvention “methods” “cannot yield any functional result without human
13 comprehension of its content, human decision-making, and human action.” *See Corley*, 273 F.3d
14 at 451. Users cannot merely convert his descriptions into a functional device or tool with one
15 mouse click, as they could with the computer program in *Corley*. Instead, users must individually
16 follow each of the instructions as they would with a recipe. Accordingly, the comments lack the
17 degree of instant functionality that the court found decisive in *Corley*, and instead are “entirely
18 speech.” *See id.* Therefore, a holding by this Court that Stottlemire’s comments violated either
19 § 1201(a)(2) or § 1201(b) would conflict with the explicit guidance provided by Congress in
20 § 1201(c)(4) instructing that § 1201 should not diminish the right to free speech.

21 In addition to § 1201’s statutory language and associated caselaw, there are sound
22 policy reasons to draw a bright line between circumvention tools and speech. Extending the
23 anticircumvention provisions to pure speech could stifle scientific research and technological
24 innovation. *See, e.g.*, Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of*
25 *Reverse Engineering*, 111 Yale L.J. 1575, 1646-47 (2002). Already, some researchers have been
26 forced to contend with DMCA threats when attempting to publish scientific research papers. *Id.*
27 at 1647. In one incident, Princeton computer science professor Edward Felten accepted a
28 challenge from the Recording Industry Association of America (“RIAA”) to find flaws in their

1 audio recording protection measures. When the RIAA learned that he planned to publish his
2 results, it threatened to sue for violation of the DMCA. *Id.* at 1647 n.333. The threat was
3 eventually dropped, but not before Felten spent significant resources on the legal battle, and the
4 colorable threat of legal liability has had a chilling effect on other researchers. *Id.* Permitting
5 Coupons to proceed on its § 1201 claims against Stottlemire's pure speech would only
6 exacerbate the legal uncertainty that has plagued researchers in the computer security field.

7 For these reasons, the First and Second Causes of Action should be narrowed to
8 eliminate any reliance on Stottlemire's comments.

9 **C. The Fifth Cause of Action for Conversion and Trespass to Chattels Should**
10 **Be Dismissed Because It Is Vague, Threatens Consumer Rights, and is**
 Preempted by the Copyright Act

11 Coupons Fifth Cause of Action, alleging conversion and trespass to chattels, fails
12 on at least three grounds. First, the claim does not describe its central element—what property
13 Stottlemire is accused of converting or trespassing upon. Second, all of the tangible property
14 identified in the complaint belongs to Stottlemire. Finally, Coupons' claim cannot be based upon
15 any of its intangible property interests, as any such claim is preempted by federal copyright law.

16 **1. Coupons Has Failed to Specify the Personal Property Involved in its**
17 **Claims**

18 Coupons asserts that Stottlemire has committed conversion and trespass to
19 chattels, but has not alleged what item of its property Stottlemire has interfered with. Under
20 Federal Rule of Civil Procedure 8(a) and *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007),
21 a complaint must show that the pleader is entitled to relief and must "give the defendant adequate
22 notice of what the claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2);
23 *Twombly*, 127 S.Ct. at 1964. A bare assertion that a claim exists and that some set of facts may
24 be discovered that entitles the plaintiff to relief is not sufficient. *Twombly*, 127 S. Ct. at 1965.
25 Coupons has failed to specify what item of its property it believes has been interfered with and
26 has failed to allege any facts that would constitute either a trespass to chattels or a conversion
27 claim against Stottlemire.

28 The requirement to specifically call out the item of property interfered with is not

1 superficial or ancillary. Ownership of the personal property involved in a conversion or trespass
2 to chattels claim is an essential element of the claim. *See Kasdan, Simons, McIntyre, Epstein &*
3 *Martin v. World Savings & Loan Assoc.*, 317 F.3d 1064, 1069 (9th Cir. 2003) (noting that the
4 elements of conversion include “(1) the plaintiff’s ownership or right to possession of the
5 property”).⁵ Nonetheless, Coupons has failed to specify the property in which it is asserting an
6 ownership interest. The essence of the Complaint is that after Stottlemire installed Coupons’
7 software on his computer, he circumvented security features that were part of that installed
8 software and then printed “unauthorized” copies of coupons. (SAC ¶¶ 15-16, 26.) However,
9 Coupons has not stated whether it thinks its software, the security features contained in that
10 software, the “unauthorized” copies of coupons, or something else entirely constituted the
11 relevant personal property. By failing to specify the property involved in this claim and its
12 ownership of that property, Coupons has failed to give Stottlemire adequate notice of the
13 grounds upon which the claims rest, and therefore the claims should be dismissed.

14 **2. There Is No Property in this Case That Would Properly Lead to a**
15 **Conversion or Trespass Claim**

16 Moreover, there appears to be no set of facts that would support a trespass or
17 conversion claim. Conversion and trespass may be based on either tangible or intangible
18 property. *See, e.g., Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (holding that
19 misappropriation of the intangible domain name “sex.com” was properly handled as a
20 conversion claim); but *cf. Nimmer § 1.01 [B](1)(i-j)* (noting that the torts of conversion and
21 trespass relate to “interference with *tangible* rather than *intangible* property.” (emphasis added)).
22 In this case, however, all the relevant tangible property is owned by Stottlemire. And, as
23 explained below, Coupons’ claims for conversion or trespass based on its *intangible* property are
24 preempted by federal copyright law. *See Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115,

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26 ⁵ The other elements of the claims are: the defendant either interfered with plaintiff’s use or
27 possession of the property (conversion), or damaged the property (trespass); without plaintiff’s
consent; causing harm to the plaintiff; and said harm was substantially due to the conduct of the
defendant. *Judicial Council of California Civil Jury Instructions §§ 2100-01*.

28

1 1130 (N.D. Cal. 2001) (conversion claims based on intangible copyrights are preempted by
2 federal law).

3 a. **Stottlemire, Not Coupons, Owns All Tangible Property in this**
4 **Case, and Thus Coupons Cannot State a Claim for Either**
Conversion or Trespass Based on Tangible Property

5 As to tangible property, Coupons has not alleged ownership of any of the tangible
6 property that could possibly have been involved in either a conversion or trespass claim. There
7 are only four items of tangible property mentioned in the complaint: printers for printing
8 coupons, the paper on which the coupons are printed, the personal computer that activates the
9 printing process, and Coupons' server that sends the coupon data to the personal computer for
10 printing. (SAC ¶ 15.) However, as alleged, the computer, the printer, and the paper at issue all
11 belong to Stottlemire, not Coupons. (*See id.* (alleging that client software was running on "the
12 consumer's personal computer" and the coupon was sent directly to "the consumer's printer").)⁶)⁶

13 As to Coupons' computer servers, there is no allegation that Stottlemire ever
14 interfered with them. Instead, quite the opposite is true: Coupons notes that, rather than
15 Stottlemire meddling with its servers, it is *Coupons* that sends files from its server to
16 *Stottlemire's* computer. (SAC ¶ 15.)⁷

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19 ⁶ Any claim by Coupons that it has acquired a tangible property interest in Stottlemire's
20 computer or paper as a result of the incorporation of its intellectual property (for example, by
21 Stottlemire installing Coupons' software on his computer) should be rejected as absurd.
22 Intellectual property and tangible media are legally separate. *See, e.g., Dowling v. United States*,
23 473 U.S. 207, 217 (1985) (finding that while distributing bootleg Elvis Presley records may
24 constitute copyright infringement, the copyrights are distinct from the physical records
themselves). To hold otherwise would mean that any software company, such as Microsoft,
would own large portions of every computer and electronic device running its software;
moreover, record labels would have a property interest in every consumer's iPod; and television
studios would own part of every viewer's TiVo digital video recorder. This is not the law.

25 ⁷ Even if an impairment of Coupons' servers were alleged, the standard for impairment is non-
trivial. *See Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1356 (2003) (sending tens of thousands of
26 emails over a period of 21 months did not put such a strain on Intel's email server that a trespass
action was appropriate). Under *Twombly*, Coupons would need to allege not merely unauthorized
27 use of its servers, but would need to point to facts suggesting so much unauthorized use that the
functioning of the servers was impaired.

28

b. Claims Based on Coupons' Intangible Property Are Preempted by the Copyright Act

Because all tangible property that could form the basis of a conversion or trespass claim belongs to Stottlemire, only Coupons' intangible property rights remain as a possible source for these claims. However, as shown below, to the extent those claims are based on Coupons' alleged copyright in its software or coupons, those claims are preempted by federal law.

Judge Breyer’s ruling for this Court in *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115 (N.D. Cal. 2001), is particularly instructive. Plaintiff Firoozye was a software developer who claimed the defendant converted his property by copying and distributing his software to its customers without a license. *Id.* at 1118-19. The Court held first that the software (and computer programs in general) fell within the subject matter of copyright. *Id.* at 1125. The Court then held that, because the plaintiff failed to allege the defendants converted a specific physical or tangible piece of his property (instead the plaintiff alleged that “defendants

1 wrongfully reproduced [his software] without his permission”), the conversion claim failed to
2 add an “extra element beyond unauthorized copying” and was therefore preempted by the
3 Copyright Act. *Id.* at 1130.

4 This case is on all fours with *Firoozye*. First, Coupons has not alleged that the
5 property converted or trespassed upon is anything other than the intangible ownership rights in
6 either its coupons or software, both of which are subject matter covered by the Copyright Act.
7 (*See SAC ¶ 12 (“coupons are works subject to copyright protection”).*) Second, Coupons has not
8 alleged violation of any rights other than those protected by § 106. Coupons alleges unauthorized
9 copying and distribution of coupons and unauthorized modification to an installed copy of the
10 coupon-printing software. (SAC ¶¶ 23, 26.) The Copyright Act provides the exclusive remedy
11 for copying and distribution under § 106(1), (3), and for creating modified (or derivative) works
12 under § 106(2). *See §§ 106, 301(a)*. Thus because Coupons’ intangible property rights are within
13 the subject matter of federal copyright law and because Coupons has failed to allege any
14 additional elements beyond those covered by § 106, its conversion and trespass claims are
15 preempted by § 301(a) and should be dismissed.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the First and Fifth causes of action should be
3 dismissed, and the Second cause of action narrowed.

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6 DATED: March 25, 2008

By: _____ */s/ Jennifer A. Lynch*

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